

Decision \_\_\_\_\_

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of the CITY OF RICHMOND for an order preserving the wigwag warning devices at the Richmond Avenue Crossing in the City of Richmond, Contra Costa County, California.

Application 02-05-065  
(Filed May 31, 2002)

Wayne Nishioka, Attorney at Law, for  
City of Richmond, applicant.

R. Curtis Ballantyne, Attorney at Law, for  
The Burlington Northern & Santa Fe  
Railway Company, respondent.

**OPINION GRANTING APPLICATION****1. Summary**

We grant the request of the City of Richmond (City) to prevent removal of the wigwag warning devices (wigwags) at the Richmond Avenue crossing (Crossing) by The Burlington Northern Santa Fe Railroad Company (BNSF), because BNSF did not apply for or receive Commission approval of the work on the Crossing that includes removing the wigwags. BNSF may not undertake any work on removing, changing the type, or adding to the automatic warning devices at the Crossing until it has received approval from the Commission. This proceeding is closed.

## **2. Statement of Facts**

### **2.1 The Application**

The City filed an application on May 31, 2002, that sought, in the alternative, to preserve the wigwags as the only operative warning system at the Crossing, or to stop the work begun by BNSF in January 2002 to replace the wigwag warning system at the Crossing. The City's dispute with BNSF arose from BNSF's plan to replace the wigwags with cantilevered flashing light signals with gates conforming to Standard 9-A in General Order (GO) 75-C and constant time warning device circuitry (the replacement project).

### **2.2 The Setting**

The Crossing<sup>1</sup> is located in the Point Richmond area of the City. It is an at-grade crossing at the edge of a rail yard owned and used by BNSF. The tracks cross East Richmond Avenue at the intersection of Richmond Avenue and West Cutting Boulevard. Near the Crossing, West Cutting Boulevard intersects South Garrard Boulevard. Nearby on the other side of the Crossing, Railroad Avenue intersects Richmond Avenue.<sup>2</sup>

BNSF's switching operations at its yard involve moving engines and cars into the Crossing about 10 to 20 times a day. This movement constitutes less than 10% of the switching activity at the yard. These switching operations are the only current use for the tracks at the Crossing.

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<sup>1</sup> The Crossing has Commission crossing number 2-1190.40 and U.S. Department of Transportation crossing number 029-886-H.

<sup>2</sup> An aerial photograph of the Crossing area, introduced into evidence by the City at the Evidentiary Hearing (EH), is reproduced as Appendix A.

The Crossing is located within the Point Richmond Historic District, which was entered into the National Register of Historic Places in 1979. The wigwags were placed on the Richmond Historic Register by a City Council resolution adopted on April 2, 2002. BNSF brought suit in Superior Court to invalidate this designation. The trial court ruled the designation invalid. The City has appealed this determination.<sup>3</sup>

The wigwags have been the warning devices at the Crossing for about 80 years. One wigwag is placed on either side of the Crossing on Richmond Avenue. They are stationary signaling devices that move the circular warning pattern and light at the top of the device back and forth (a “wig wag” movement). They also have bells, which provide the sole pedestrian warning device at the Crossing. The wigwags at the Crossing are the only top quadrant wigwags still in service in California.<sup>4</sup> There have been no recorded injuries in the small number of reported accidents between vehicles and trains at the Crossing during the entire time the wigwags have been in use. Some accidents involving pedestrians and trains have been reported.

### **2.3 The Work on the Crossing**

BNSF’s predecessor, The Atchison, Topeka and Santa Fe Railway Company, proposed to the City that the equipment at the Crossing be changed to

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<sup>3</sup> The Administrative Law Judge (ALJ) took official notice of the institution of the litigation at the EH. After the Presiding Officer’s Decision (POD) in this proceeding was mailed, BNSF sought to reopen the record to take official notice of the documents concluding the Superior Court case; the City sought official notice of its notice of appeal of the Superior Court decision. The ALJ granted both requests.

<sup>4</sup> “Top quadrant” wigwags are suspended from below and wig wag at the top.

add gates, updated warning lights, and rubberized crossing panels. In May 1993, the City Engineer expressed interest in the project and in seeking federal funding for it.<sup>5</sup> Little else happened until August 1998, when a diagnostic meeting was held among BNSF, City staff, and Commission staff. Although no document memorializing the diagnostic meeting or its results was entered into the record of this proceeding, there is no dispute that the proposed action emerging from the meeting was to undertake the replacement project.

The earlier interest in the replacement project was not sustained by the City. In August 1999, the City Council adopted a motion opposing the replacement project. BNSF then notified the California Department of Transportation (CalTrans), which administers the § 130 program in California, that the railroad would pay the City's 10% share of funding for the replacement project. A meeting among representatives of the City, BNSF, and Commission staff on December 7, 1999 failed to resolve the dispute. In a letter dated June 16, 2000, Commissioner Bilas urged the City's mayor to defer to the view of Commission staff that the replacement project was an important safety improvement at the Crossing.

In order to receive federal funds for the project, in November 1998 BNSF submitted a cost estimate for the project to CalTrans. On December 8, 1999, CalTrans notified BNSF that federal funds had been allocated for the replacement project and issued a "Notice to Proceed" for the work. BNSF

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<sup>5</sup> Under a program set up by federal statute, 23 U.S.C. § 130, federal matching funds are made available for various kinds of rail crossing safety improvement projects. This funding is commonly referred to as "§ 130" funds.

notified the City by letter in July 2000 that it would soon be scheduling the work on the replacement project at the Crossing.

BNSF began work on the replacement project in January 2002. The work was approximately 70% complete when the City issued a stop-work order on January 19, 2002, on the basis that BNSF did not have a required encroachment agreement with the City. BNSF has not done any more construction work on the replacement project since the stop-work order.

### **3. Discussion**

#### **3.1 Procedural Matters**

The City's application is unusual, since the City does not seek our permission to take any action, but rather seeks an order prohibiting certain actions by BNSF. A complaint against BNSF under Pub. Util. Code § 1702 would have presented a procedurally clearer approach. In the interest of having a decision in the existing proceeding, BNSF waived any objection to the irregularity of the City's use of an application rather than a complaint. BNSF did not, however, submit plans for the replacement project at the EH, leaving the record in this proceeding inadequate for a decision on the merits of the replacement project. Because the proceeding was categorized as adjudicatory, the formal problem presented by the use of the application instead of the more appropriate complaint has no practical consequences.

#### **3.2 Safety Issues**

Both parties expressed concerns about safety at the Crossing. The City emphasized issues of pedestrian safety and problems caused by trains staying in the Crossing area too long. BNSF emphasized the problems of the wigwags failing or needing repair, as well as problems of traffic going through the Crossing when the wigwag warning signal is on.

Both parties also presented ideas about possible safety improvements to the Crossing and its operations that, standing alone, do not depend on the completion of the replacement project or on our approval. One safety problem on which the parties agreed is that of a train entering the approximately 600-foot approach zone to the Crossing and staying there or receding, without clearing the Crossing. Because of the current circuitry used for the Crossing, this causes the wigwags to stay in motion for many minutes, until the train either clears the Crossing or goes back beyond the 600-foot distance. For much or all of that time, no train is in the Crossing itself, but the wigwags are in their warning aspect. This can confuse drivers and pedestrians, potentially leading them to move into the Crossing in the belief that no train will enter it. Constant warning circuitry, which BNSF intends to install as part of the replacement project, will eliminate the problem of continual warning signals if a train stops in the approach to the Crossing. This circuitry can work both with new signals and with the wigwags.

The City noted that the design of the streets leading into the Crossing could be improved. The City could, with relative ease, close off a portion of West Cutting Boulevard and turn the closed-off area into a parking lot. This would reduce the number of approaches to the Crossing for vehicular traffic, as well as create a more perpendicular approach to the Crossing for all traffic.

### **3.3. General Order 75-C**

Protection of grade crossings is governed by GO 75-C. Section 10, headed Removal, Reduction, or Substitution or Addition of Warning Devices, provides:

No railroad shall hereafter remove, change the type, or add an automatic warning device, crossing gate, crossing flagman or other forms of crossing warning device or reduce the hours during which any such warning method is

maintained, unless prior consent for such removal, addition, or reduction shall have been secured from this Commission; provided, however, that a flagman on duty to temporarily direct at a crossing during an emergency, may be removed without such consent. Application for consent of the Commission may be in letter form; however, the Commission may require filing of a formal application and a hearing. Upon completion of any approved changes in warning devices, notice of such change shall be given the Commission within thirty (30) days following the close of the month in which the change is effective.

The City asserts that BNSF violated this requirement by starting work on the replacement project without seeking our prior consent. BNSF does not claim that it applied for consent. Rather, BNSF argues that it did not need to apply for approval at all. Before April 2000, a railroad's decision to change or add crossing protection was not subject to our prior approval. Effective April 6, 2000, however, § 10 of GO 75-C was amended to add changes in the type of crossing protection, or additions or improvements to existing crossing protection, to the actions that required our approval.<sup>6</sup> Since the replacement project was approved for funding by CalTrans in December 1999, BNSF reasons, it did not need to seek further approval from the Commission after the April amendment. Alternatively, BNSF claims that it effectively received "concurrence" of the Commission in the form of Commissioner Bilas' letter to the City in June 2000.

The City concedes that the prior version of § 10 would not have required our advance approval of the replacement project. It argues that,

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<sup>6</sup> In relevant part, the amendment added "change the type, or add" to the first sentence of § 10, and deleted a provision at the end that stated "No consent is necessary for installing additional or improved protection, however." (The April amendment.)

because work on the Crossing was not begun until January 2002, the current version of § 10 should apply.

We conclude that BNSF should have applied for our consent for the replacement project. Assuming that BNSF did substantial planning for the replacement project before GO 75-C was amended in April 2000, our conclusion is not changed. It is undisputed that the work did not begin until well after the amendment of GO 75-C, and that BNSF did not even schedule a time for the work to be started until after the April amendment was in effect. The text of GO 75-C § 10, both before (“remove” and “install[ ]”) and after the April amendment (“remove, change the type, or add . . .”), is directed to physical actions, not planning or funding decisions that may precede the physical changes. The prohibition effected by the April amendment is complete. It contains no savings clause or exception for projects that had been planned or funded but not executed prior to the April amendment.

Moreover, the argument that prior planning for the replacement project nevertheless overcomes the express language of the April amendment has no limiting principle. Because most, if not all, projects include some planning work even before the project is formally proposed, we decline to adopt such an open-ended approach. If any applicant who writes a letter of inquiry about a project could later come to us and urge that a change to our general orders should not apply to its project because some planning work was done prior to the change, the stability of our general orders would be undermined.



BNSF started to change the automatic warning devices at the Crossing more than a year after the April amendment became effective. BNSF did so without our consent,<sup>7</sup> and thus failed to comply with GO 75-C.

### **3.4 Next Steps**

Because no application to undertake the replacement project is now before us, we express no views on its merits. Because we and the parties have significant interest in both safety and community values, however, we urge both BNSF and Richmond to move expeditiously either to resolve this matter or to bring an application for the replacement project before us. We note that, if BNSF does file an application for approval of the replacement project and a hearing is required, the testimony in this proceeding may be offered into evidence pursuant to Rule 72 of our Rules of Practice and Procedure.<sup>8</sup>

We also note that any application filed by BNSF for approval of the replacement project must comply with Rule 17.1 and include a Proponent's Environmental Assessment. This will avoid the possibility of further delays by allowing us to comply with our responsibilities under CEQA in deciding on the merits of the replacement project, regardless of the eventual outcome in the

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<sup>7</sup> BNSF suggests that the letter from Commissioner Bilas to the City demonstrates the Commission's "concurrence" with the replacement project, but does not expressly argue that it can be construed as the Commission approval required by GO 75-C. We agree that the letter does not satisfy the consent requirements of § 10.

<sup>8</sup> Unless otherwise indicated, all subsequent citation to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division I of Title 20 of the California Code of Regulations.

courts of the litigation challenging the validity of the listing of the wigwags on the Richmond Historic Register.<sup>9</sup>

#### **4. Request for Review and Appeal**

The Presiding Officer's Decision (POD) was mailed on April 30, 2003. On May 29, 2003, Commissioner Peevey filed a request for review of the POD. BNSF filed an appeal of the POD on the same date. The City filed a response on June 13, 2003 that supports the POD.

The request for review submits that the award of funding for the replacement project by CalTrans indicates that planning work was done on the replacement project prior to the amendment of GO 75-C. As a consequence, according to the request for review, the replacement project should be governed by the earlier version of GO 75-C, which did not require that BNSF receive Commission approval, and the replacement project may now proceed. As we explained in § 3.3, above, BNSF's previous planning work does not insulate it from having to comply with our general orders in effect at the time it sought to implement the replacement project.

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<sup>9</sup> Crossing protection projects are ordinarily categorically exempt from review under the California Environmental Quality Act (CEQA). (Rule 17.1(h)(1)(A).) The listing of the wigwags on the Richmond Historic Register, however, created a presumption that the wigwags are "historically or culturally significant" for CEQA purposes. (Pub. Res. Code § 21084.1.) The Legislature has provided that "[a] project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." (Pub. Res. Code § 21084.1.) Such a project cannot be categorically exempt from CEQA, regardless of whether it might otherwise fit within an exemption. (CEQA Guidelines § 15300.2, subd. (f).)

BNSF's appeal contends that the POD's analysis of the CEQA issues rests on the validity of the listing of the wigwags on the Richmond Historic Register, which BNSF argues is invalid. BNSF also contends that a decision on the merits of the replacement project can and should be made in this proceeding.

We adhere to the outcome of the POD. BNSF does not contest our conclusion that it needed, but did not receive, our permission before beginning construction on the replacement project. In response to BNSF's other observations, we have clarified the context of our discussion of CEQA and have addressed some of the limitations of the record in this proceeding that prevent us from deciding on the merits of the replacement project now. We leave to the courts the decision on the validity of the listing of the wigwags on the Richmond Historic Register.

## **5. Assignment of Proceeding**

Michael R. Peevey is the Assigned Commissioner and Anne E. Simon is the assigned Administrative Law Judge in this proceeding.

## **Findings of Fact**

1. The at-grade crossing at Richmond Avenue in the City of Richmond, California (the Crossing) consists of tracks of the BNSF that cross Richmond Avenue.
2. The Crossing is now used exclusively for switching movements associated with the BNSF rail yard adjacent to the Crossing.
3. For approximately 80 years, the form of crossing protection at the Crossing has been two top-quadrant wigwags placed on either side of the Crossing on Richmond Avenue.
4. In November 1998, BNSF sought from CalTrans federal funding to replace the wigwags with cantilevered flashing light signals with gates conforming to

Standard 9-A in GO 75-C and constant time warning device circuitry (the replacement project).

5. In August 1999, the Richmond City Council passed a resolution opposing the replacement project.

6. In December 1999, BNSF received a commitment of federal funds for the replacement project from CalTrans.

7. In July 2000, BNSF notified the City that it would soon be scheduling work on the replacement project.

8. In January 2002, BNSF began work on the replacement project.

9. On January 19, 2002, the City issued a stop-work order on the replacement project.

10. At the time of the stop-work order, work on the replacement project was about 70% complete.

11. BNSF has done no further work on the replacement project at the Crossing since the stop-work order.

### **Conclusions of Law**

1. The replacement project is governed by GO 75-C, as amended on April 6, 2000.

2. GO 75-C requires that projects such as the replacement project receive prior approval of the Commission.

3. BNSF has not received the prior approval of the Commission for the replacement project.

4. BNSF cannot undertake work on the replacement project without approval of the Commission, pursuant to formal application under GO 75-C.

5. In order to clarify the status of the replacement project, this decision should be effective immediately.

**O R D E R**

**IT IS ORDERED** that:

1. The Burlington Northern Santa Fe Railroad Company (BNSF) shall immediately stop work on its project to replace the warning devices at the Richmond Avenue crossing (Crossing) in Richmond, California.
2. BNSF may not undertake any work on removing, changing the type, or adding to the warning devices at the Crossing until it has received approval from the Commission.
3. BNSF shall advise the Commission within 45 days of the issuance of this opinion whether it intends to file an application to remove, change the type, or add to the warning devices at the Crossing, and, if relevant, approximately when such an application will be filed.
4. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

## **APPENDIX A**